

JUDGMENT OF THE COURT (FIRST CHAMBER)  
OF 11 MAY 1978<sup>1</sup>

**Lucienne De Roubaix, née De Leye**  
**v Commission of the European Communities**

“Official — promotion”

Case 25/77

1. *Officials — Recruitment — Vacancy notice — Access to the post — Conditions — Officials eligible for transfer or promotion — Candidature excluded — Act adversely affecting an official*  
(*Staff Regulations of Officials, Art. 29 (1) (a)*)
2. *Officials — Duties corresponding to a higher grade — Acceptance — Reclassification — Right — Absence*  
(*Staff Regulations of Officials, Art. 7*)

1. In so far as the effect of the conditions governing access to a post, fixed by the vacancy notice, is to rule out the candidature of officials who are eligible for transfer or promotion, the vacancy notice constitutes an act adversely affecting such officials.
2. Although an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a temporary posting, the fact that he agrees to perform them may be a factor to be borne in mind in connexion with promotion, but does not give him the right to be reclassified.

In Case 25/77

LUCIENNE DE ROUBAIX, NÉE DE LEYE, an official of the Commission of the European Communities, residing at 13 Avenue des Croix du Feu, 1020 Brussels, represented and assisted by Marcel Grégoire and Edmond Lebrun, Advocates at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Raymond Baeyens, acting as Agent, assisted by Denise Sorasio-

<sup>1</sup> — Language of the Case: French.

Allo, a member of the Legal Department of the Commission, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Vacancy Notice No COM/267/76 relating to a post in Grade B 1 assigned to the Delegation of the Commission in Washington (Euratom Supply Agency), of the decisions not to accept the applicant's application for that post and to appoint Mr M to it, and of the implied decision rejecting the applicant's complaint lodged on 2 August 1976,

THE COURT (First Chamber)

composed of: G. Bosco, President, J. Mertens de Wilmars and A. O'Keeffe, Judges,

Advocate General: J.-P. Warner  
Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Facts and Issues

The facts of the case, the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

#### I — Facts and written procedure

The applicant, a Belgian national born in 1918, was engaged by the EAEC on 1 August 1959 and posted to the Euratom Supply Agency, where she has

spent her whole subsequent career. On 1 July 1968 she was promoted to Grade B 2, step 1.

The last periodic report which had been made on the applicant at the date on which the application was lodged and which covers the period from 1 July 1971 to 30 June 1973 describes the principal duties allotted to and carried out by her in the following terms:

"The duties and responsibilities of Mrs De Roubaix are those of Head

Clerk of the Agency. She is responsible for documentation, for the supervision of the archives and the post, for the administration of the budget and for the financial transactions arising out of administration of the Agency's capital. In addition, she is responsible for the invoicing relating to the commercial activities of the Agency."

During the preparation of the Commission's preliminary draft budget for 1975 the Agency repeated its request for the creation of two posts in Grade B 1, one of which was to be assigned to Brussels and the other to Washington (the Agency also wished to return the Grade B 2 post in Washington to the Directorate General for Energy, which wished to assign it to its office in Luxembourg). In the light of the guide-lines laid down by the Commission on the basis of its concern for budgetary austerity the Agency confined itself, when the preliminary draft budget for 1976 was being prepared, to a request for the creation of a single post in Grade B 1. The new post sought, which was to be obtained on 18 December 1975, expressly concerned the Delegation of the Commission in Washington. Since then the Agency has again asked for a Grade B1 post to be created for Brussels.

Vacancy Notice No COM/267/76 therefore related to a post in Grade B 1 at the Euratom Supply Agency, with assignment to Washington. The qualifications required were primarily:

- A thorough knowledge of the nuclear fuel industry;
- Wide business experience if possible;
- Wide experience relevant to the post.

Mr M was appointed to the post by decision of 30 June 1976. He is a Belgian national, born in 1928, who entered the service of the EAEC in 1959. On 1 May 1970 he was posted to Washington and entrusted with various

duties falling within the ambit of the safeguards system and the Supply Agency. He was promoted to Grade B 2 on 1 January 1971.

The applicant, who had applied for the post in question, was advised on 6 July 1976 that her application had not been successful. As there was no response to her complaint within the meaning of Article 90 (2) of the Staff Regulations, which was registered on 2 August 1976, she lodged the present application on 18 February 1977. It was received by the Court Registry on 22 February 1977.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without holding any preparatory inquiry.

## II — Conclusions of the parties

The applicant claims that the Court should:

- Annul Vacancy Notice No COM/267/76 concerning a post in Grade B 1 at the Euratom Supply Agency assigned to Washington;
- Annul the decisions not to accept the applicant's application for that post and to appoint Mr M to it;
- Annul the implied decision rejecting the applicant's complaint registered on 2 August 1976 under No 4482;
- Order the defendant to pay the costs.

The defendant contends that the Court should:

- Dismiss the present application in its entirety, as inadmissible in part and entirely unfounded;
- Order the applicant to pay the costs.

In her reply the applicant states that the first head of conclusions in the application is to be understood as follows: "Annul the decision to assign to Washington the post in Grade B 1 forming the subject of Vacancy Notice No COM/267/76 and to draw up the said Vacancy Notice accordingly".

### III — Submissions and arguments of the parties

#### *Admissibility*

The *Commission* observes that a vacancy notice cannot constitute an act capable of adversely affecting an official, since it is merely in the nature of a measure publishing an earlier decision and of a measure preparatory to the decision to fill the post. At the very most the irregularity of the vacancy notice may be pleaded in support of an application for the annulment of subsequent decisions.

When it is considered that the application for annulment is in reality directed against the decision to assign the newly-created post to Washington, the inadmissibility of the application is no less evident. The decisions relating to the distribution of the available posts in the various administrative units fall within the field of the *Commission's* discretionary powers in the matter. The fact that the contested decision concerns the assignment of a single post ought not to affect that principle. In fact, that decision is entirely distinguishable from the measures of an individual nature affecting the position of one or other servant — appointments, promotions, even transfers — which are capable of adversely affecting the person concerned.

The *applicant* observes that as the head of the conclusions at issue criticizes the decision to assign the said post in Grade B 1 to Washington and to draw up the vacancy notice accordingly it follows that the first ground of inadmissibility put forward by the defendant is purposeless.

Furthermore, "discretionary power" means "non-arbitrary power" and that necessarily implies review by the court, even if only in relation to the aim pursued. At the very least, therefore, the question of the admissibility of that head of the conclusions is linked to the substance and, more particularly, to the complaint relating to misuse of powers.

The *Commission* replies that the mere amendment by the applicant of the wording of one of the heads of her conclusions does not affect the question of its admissibility. The existence of an action brought by the applicant on the basis of the decision not to accept her application — a point on which the defendant has not put forward any objections as regards admissibility — confirms that the legal guarantees enjoyed by servants are in no way diminished by observance of the distinction which exists between measures of a purely structural nature and those which affect them personally.

#### *Substance*

The *applicant* maintains that the contested decisions constitute an infringement of Articles 45 (1) and 7 (1) of the Staff Regulations and a misuse of powers. Mr M was in fact appointed to the post in dispute:

- Without a prior consideration of his comparative merits with those of the applicant (the applicant's periodic report for the period from 1 July 1973 to 30 June 1975 was not drawn up when that promotion procedure was carried out);
- Without any account having been taken of the indispensable reclassification of the applicant or, at least, of the fact that she performed duties corresponding to a grade higher than her own (the applicant claims that since 1959 she has performed *de facto* the duties of Head Clerk, that is, those corresponding to the basic post of Principal Administrative

Assistant, Grade B 1). In that regard she produces, in addition to her periodic reports, a letter from the first Director General of the Agency, dated 1964, stating that in his opinion the rôle played by the applicant "appears to justify the highest grade in Category B and to correspond to that of Principal Administrative Assistant").

Furthermore, Vacancy Notice No COM/267/76 was not drawn up in the interests of the service but in order to permit the appointment of Mr M, which had previously been agreed. Since there was only one post available it would have been in the interests of the service to assign it to Brussels, where it had been needed for 17 years and where the duties were more important. In that way a Grade B 2 post would have been released which, if transferred to Washington, would have enabled the B 2 post there to be restored to Directorate General XVII.

The *Commission* observes that the applicant's arguments do not in any way satisfy the conditions which must be fulfilled in order to demonstrate the existence of a misuse of powers. Such a misuse is to be evidenced by objective, relevant and consistent factors showing that the administration used its powers for purposes other than those for which they were conferred upon it (judgment of the Court of Justice of 5 May 1966 in Joined Cases 18 and 35/65, *Gutmann* [1966] ECR 103).

Although the Commission does not dispute that the duties to be carried out at Brussels may be regarded as corresponding to a post in Grade B 1, it states that they were considerably reduced with effect from 1974 following the assignment to the Agency of an additional post in Category A. On the other hand, although the nature of the duties to be performed at Washington is the same, they involve additional responsibilities and indeed are

constantly on the increase (they are characterized in particular by the importance of the relations to be maintained with American circles). There is, therefore, nothing incomprehensible in the fact that in 1974 the Agency added a request for a Grade B 1 post for Washington to that which it had already submitted for Brussels and then in 1975, when compelled to reduce its demands as a result of the policy of budgetary austerity, embarked upon by the Commission, regarded the post last applied for as of greater importance as regards the interests of the service.

As regards the infringement of Article 45 (1) of the Staff Regulations the applicant has no argument to put forward. The fact that her periodic report for the period from 1 July 1973 to 30 June 1975 was not drawn up in time for the consideration of the comparative merits of the various applicants cannot have had any unfavourable effect, for the simple reason that that report was on the whole slightly less eulogistic in its appraisals of her than the previous one had been.

The necessary consideration of comparative merits was in fact carried out. The applicant refers only to a number of factors which are, in her eyes, such as to justify promotion to Grade B 1 but which are in no way capable of demonstrating her specific qualifications for the post in question. The differences of age and seniority in the grade are not of decisive importance. Although they are obviously factors to be taken into consideration in relation to promotion within a single career bracket, they can only be of very reduced importance when the aim is to fill a vacant post. In fact a contrary decision — to accept the applicant's application — would have disregarded the interests of the service or, at least, would have subordinated them to the career interests of one employee. Although the applicant's career may certainly justify promotion,

it cannot give her the right to occupy a post for which other officials have specific qualifications which are more appropriate.

Although it is established case-law that the fact of having taken on duties attaching to a post in a higher grade may be a factor to be borne in mind in connexion with promotion, it cannot give the official concerned a right to promotion or justify the reclassification of his post.

The *applicant* replies that when the competent authority considered the comparative merits of the candidates it had the latest periodic report available for one of them but not for the other. Not only was the applicant's periodic report for the period from 1 July 1973 to 30 June 1975 drawn up after the comparative merits were considered but what is more it is dated 18 April 1977 and was drawn up, first, very near the end of the following report period (1 July 1975 to 3 June 1977) and, secondly, after the present application had been lodged. A staff report covering a specific period which is drawn up practically at the end of the following period may unconsciously be influenced by the conduct of the official during the latter period. Thus, consideration of the merits of the candidates was not carried out in accordance with the requirements of Article 45 of the Staff Regulations.

Contrary to the written statement of the defendant, the applicant does possess the particular qualifications required for the post in question. First, she has necessarily acquired a thorough knowledge of the nuclear fuel industry. After all, if the official appointed has acquired a thorough knowledge of that industry in the course of six years spent at Washington, how would the applicant have failed to acquire it in the course of seventeen years spent at Brussels in her post as Head Clerk of the Agency, that is, in the performance of duties appertaining to a grade higher

than her own? She has, furthermore, wide business experience (cf. her periodic reports). Finally, she has wide experience relevant to the post: in particular since 1960 she has had close contacts with the American authorities and the suppliers.

The defendant does not give any explanation as regards the alleged additional responsibilities attaching to the post in Washington. The Grade B 1 post was not assigned to Washington in the interests of the service. That is shown by various internal memoranda which preceded the grant of the post in dispute by the Council or, at least, publication of the vacancy notice. The applicant requests the production of those memoranda in the name of the co-operation which must exist between the parties in the production of evidence.

The *defendant* replies that however regrettable the absence of the periodic report for the period from 1 July 1973 to 30 June 1975 may be it cannot, for the purposes of the proceedings for annulment, have had any real influence on the contested decision. It refers to the recent judgment of the Court of 14 July 1977 (*Geist*, Case 61/76 [1977] ECR 1419), in which the absence of any report for three consecutive periods was censured only from the point of view of the Commission's responsibility. The content of her last report, which was drawn up after the adoption of the decision at issue, must in any case be regarded as immaterial as regards the solution of the present dispute, since it could not have been more favourable than those available in June 1976, all of which bore the comment "better than average". The applicant cannot, therefore, validly claim that the absence of her last periodic report can have reduced her chances of promotion. It is that factor which is decisive in assessing whether the decision of 30 June 1976 was vitiated by an irregularity (cf. judgment of 23 January 1975, Case 29/74, *De Dapper* [1975] ECR 35).

The defendant adds that in practice the fact that the Agency is so small (16 officials in all) reduces the importance of the staff reports and that the applicant's merits were for that reason well known.

The applicant, represented by E. Lebrun of the Brussels Bar, and the Commission

of the European Communities, represented by D. Sorasio-Allo, a member of the Legal Department, acting as Agent, delivered oral argument at the hearing on 27 October 1977.

The Advocate General delivered his opinion at the hearing on 13 April 1978.

## Decision

- 1 The application, which was lodged on 18 February 1977, seeks the annulment of Vacancy Notice No COM/267/76 relating to a post in Grade B 1 assigned to the Delegation of the Commission in Washington (Euratom Supply Agency), of the decisions not to accept the applicant's application for that post and to appoint another candidate to it, and of the implied decision rejecting the applicant's complaint lodged on 2 August 1976.
- 2 During the preparation of the preliminary draft budget for 1975 the Agency had repeated its earlier request for the creation of two posts in Grade B 1, one of which was to be assigned to Brussels and the other to Washington.
- 3 However, during the preparation of the preliminary draft budget for 1976 the Agency confined itself for budgetary reasons to a request for the creation of a single post in Grade B 1, to be assigned to the Delegation of the Commission in Washington.
- 4 The vacancy notice in dispute, which thus concerned a post in the grade in question assigned to Washington, lists the following necessary qualifications:
  - A thorough knowledge of the nuclear fuel industry;
  - Wide business experience;
  - Wide experience relevant to the post.
- 5 The applicant, an official in Grade B 2, who, since her appointment in 1959, has spent her entire subsequent career at the Euratom Supply Agency, was advised on 6 July 1976 that her application for the post in question had not been successful.

### Admissibility

- 6 The defendant objects that the application is inadmissible on the ground that the vacancy notice at issue does not constitute an act adversely affecting an official within the meaning of Article 91 (1) of the Staff Regulations.
- 7 In fixing the conditions governing access to the post the vacancy notice, drawn up within the context of Article 29 (1) (a) of the Staff Regulations, determines the officials whose candidature may be accepted.
- 8 In so far as the effect of those conditions is to rule out the candidature of officials who are eligible for transfer or promotion, the vacancy notice constitutes an act adversely affecting such officials.
- 9 The objection of inadmissibility must therefore be dismissed as regards that point.
- 10 The Commission also submits that in reality the application for annulment is directed not against the vacancy notice itself but against the decision to assign the newly-created post to Washington.
- 11 It maintains that decisions relating to the distribution of the available posts in the various administrative units fall within the field of its discretionary powers in the matter.
- 12 The admissibility of that head of the conclusions is linked to the substance and, more particularly, to the complaint relating to misuse of powers.

### Substance

- 13 The applicant maintains that the contested measures infringe Articles 45 (1) and 7 (1) of the Staff Regulations and are vitiated by misuse of powers.
- 14 She alleges that the comparative merits of the candidate appointed were not considered as against her own, since her periodic report for the period from



1 July 1973 to 30 June 1975 was only drawn up after the other candidate had been appointed.

- 15 The applicant adds that the fact that for many years she had performed *de facto* duties (of Head Clerk) corresponding to a grade higher than her own was not taken into account.
- 16 She further states that the vacancy notice at issue was drawn up not in the interests of the service but in order to permit the appointment of the other candidate, which was already agreed beforehand.
- 17 Although, under Article 7 (1), an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a temporary posting, the fact that he agrees to perform them may be a factor to be borne in mind in connexion with promotion, but does not give him the right to be reclassified.
- 18 Although it is true that on several occasions the Director General of the Agency requested the creation of two posts in Grade B 1, one to be assigned to Washington and the other to Brussels, justified budgetary considerations led him subsequently to submit only a single application concerning the post for Washington.
- 19 By deciding to give priority in that way to the post to be created in Washington, the Agency thereby acknowledged that the duties appertaining to that post involved additional responsibilities, in particular having regard to the importance of the relations to be maintained with the United States circles concerned.
- 20 The applicant's age and seniority in the grade and post, even though superior to the successful candidate's, must not prevail over the nature of the duties to be carried out.
- 21 As regards the absence of her last periodic report, the applicant maintains that this would have prevented the consideration of the comparative merits of the candidates — if it had been carried out — from taking place under the required conditions.

22 However, the applicant has not shown in what way the absence of the said report could have been prejudicial to her, since it could not have added anything to the excellent assessments made in the earlier reports.

23 The application is unfounded and must therefore be dismissed.

### Costs

24 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

25 The applicant has failed in her submissions.

26 However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions must bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Bosco

Mertens de Wilmars

O'Keeffe

Delivered in open court in Luxembourg on 11 May 1978.

A. Van Houtte

Registrar

G. Bosco

President of the First Chamber